

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,547

625

Willie Robinson, Jr., Appellant,

v.

United States of America, Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

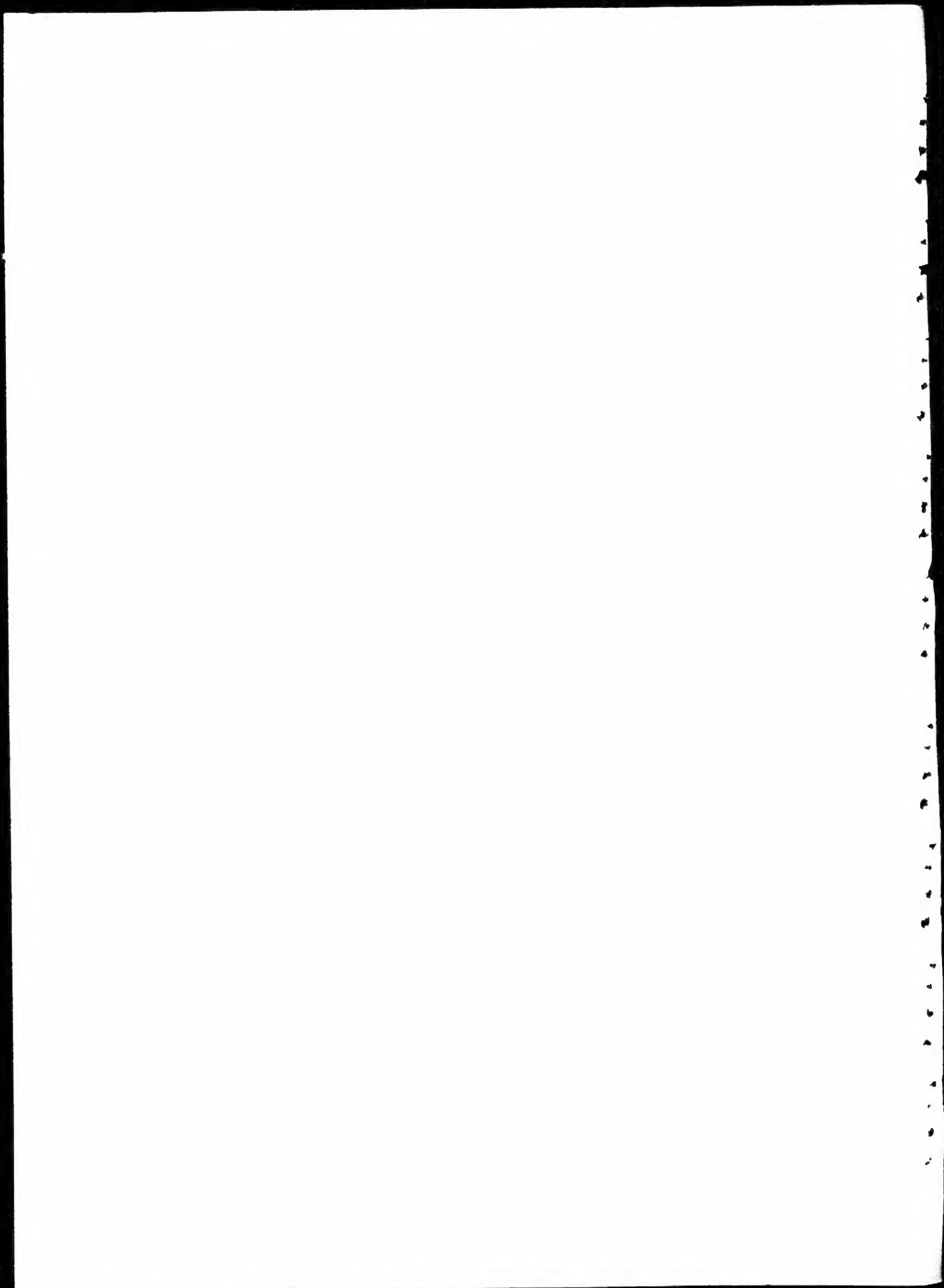
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October 5, 1964



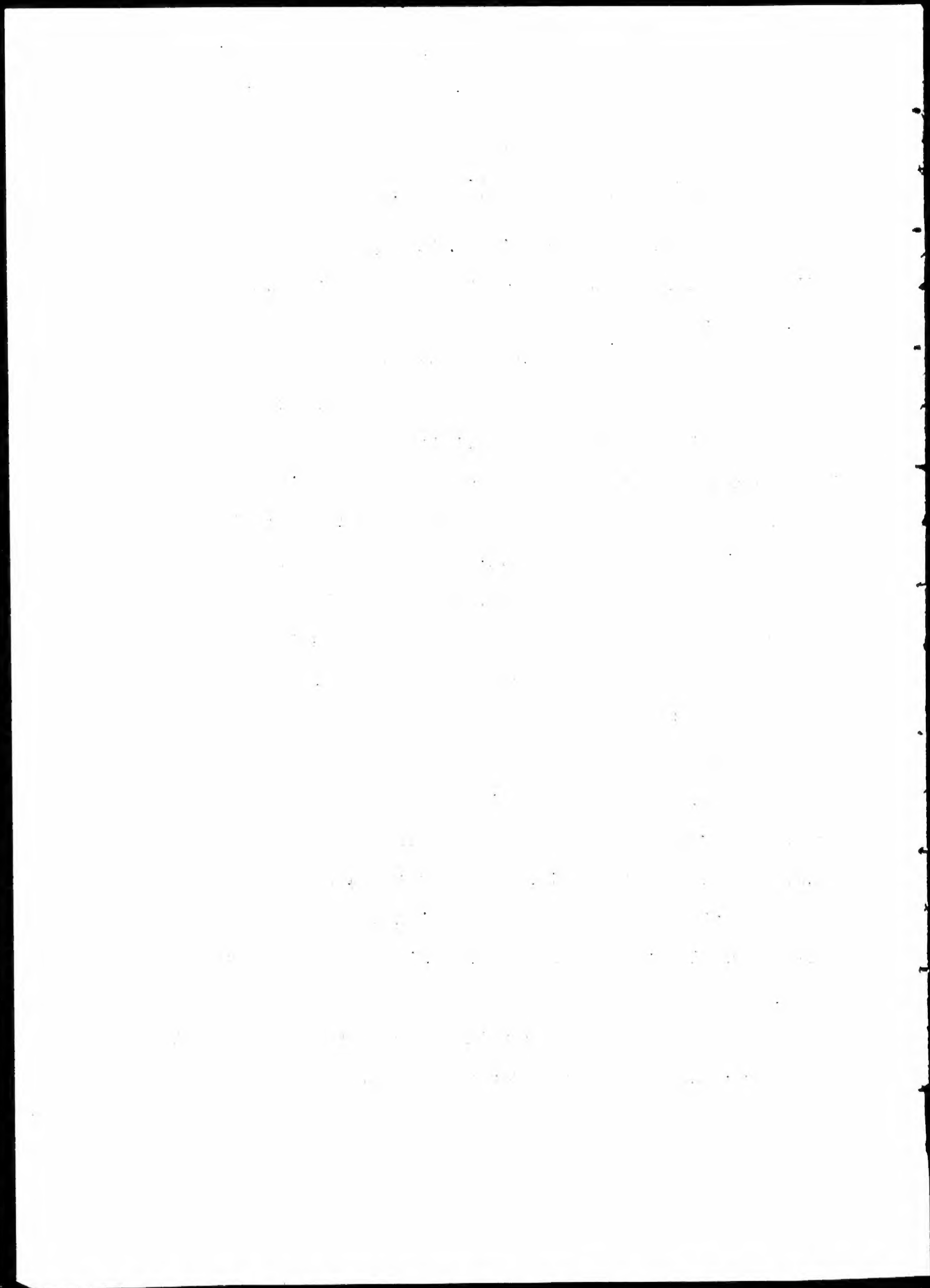
STATEMENT OF QUESTIONS PRESENTED

Appellant was convicted in a jury trial upon an indictment charging three violations of federal narcotics laws. The questions presented follow:

I. Whether the trial court erred in refusing to order stricken the testimony of a federal narcotics agent as to admissions deliberately elicited from the accused during a secret interrogation in the absence of his court-appointed counsel while the accused was being held in jail after indictment and while awaiting arraignment, when there is no evidence that the federal agent identified either himself or the purpose of his interrogation, cautioned the accused as to the consequences of his answer, or informed him of his right to have his court-appointed counsel present to advise him.

II. Whether the trial court erred in refusing to order stricken the testimony of an arresting officer which concerned alleged admissions made by the accused with respect to other crimes committed by him which were not substantially related in time to the crimes for which the accused was being tried.

III. Whether the trial court erred in permitting the prosecuting attorney, over objection, to cross-examine



the accused's chief alibi witness as to alleged criminal convictions, when the witness denied, initially and continuously, the fact of such convictions and when no attempt was made to prove the convictions as required by D. C. Code § 14-305 (Supp. III, 1964).

IV. Whether the trial court erred in refusing to hold a hearing pursuant to the Jencks Act (18 U.S.C. § 3500) after the chief government witness whose statements were sought had testified and in refusing to permit the accused to cross-examine the government witness as to a police investigation of the witness' former police partner and as to the financial circumstances of the witness where the accused sought to determine whether the witness, who testified to purchasing narcotics from the accused, had a personal interest in seeing that the accused was convicted.

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STATEMENT OF JURISDICTION

A jury convicted appellant on an indictment charging three separate violations of the narcotics laws in seven counts. Judgment was entered by the Honorable Joseph C. McGarraghy on March 18, 1964, and appellant was sentenced to serve six years on counts 1, 3, 4 and 6 and two to six years on counts 2, 5 and 7, the sentences to run concurrently. The jurisdiction of the District Court is founded upon 18 U.S.C. § 3231 and D.C. Code § 11-521 (Supp. III, 1964).

On March 18, 1964, Judge McGarraghy entered an order granting appellant's motion for leave to appeal in forma pauperis, ordering preparation of the transcript (other than opening and summation arguments to the jury) at the expense of the United States. The jurisdiction of this Court is founded upon 28 U.S.C. §§ 1291 and 1915.

STATEMENT OF THE CASE

The testimony of appellee's witnesses at trial, which was believed by the jury despite appellant's attempted proof of an alibi, indicates that on February 27, 1963, at 5:20 in the afternoon (Tr. 18), */a small package of white powder was sold to Private Rufus Moore, an undercover agent for the District of Columbia Metropolitan Police Department Narcotics Squad (Tr. 16), by a person whom Private Moore identified as appellant. Private Moore allegedly paid for the purchase with \$10.00 of Metropolitan Police Department Advance Funds. The transaction allegedly occurred in the District of Columbia in the 1900 block of 14th Street, Northwest. Tr. 18-19.

*/ The abbreviation "Tr. ____" herein refers to the Transcript of appellant's trial. References to other documents in the Record will be noted by a descriptive name of the document, e.g., "R., Indictment."

Private Moore testified further that on the following day, February 28, 1963, at 4:30 in the afternoon, he made a further purchase of two small packages of white powder from appellant in Brown's Restaurant, 1906 - 14th Street, Northwest, in the District of Columbia. Private Moore allegedly paid for the purchase with \$20.00 in Metropolitan Police Department Advance Funds. Tr. 22-23.

No record of the number of bills or of the serial numbers of the money allegedly used to make the purchases were kept by Private Moore. Tr. 27. In neither instance was any attempt made to recover fingerprints from the plastic packages which allegedly were purchased from appellant. Tr. 49-50. In the case of both alleged purchases, Private Moore said he was accompanied by a Mr. Harris, a narcotics informer and erstwhile addict who did not testify at the trial. Tr. 18, 22-23.

Two packages of white powder were passed by Private Moore to his "contact," Detective Irvin W. Brewer, during secret rendezvous on February 28 and March 1, 1963. Tr. 22, 23, 43-47. The appellee's evidence showed the requisite chain of possession from Private Moore and the testimony of its chemist indicated that the contents

of the packages passed to Detective Brewer included heroin hydrochloride.

For over two weeks following the last alleged purchase from appellant, no attempt was made to maintain surveillance over appellant and an arrest warrant was not sought until March 15, 1963. Tr. 32, 51. On March 15, 1963, Private Moore swore out a complaint for the arrest of appellant and a warrant for his arrest was issued. R., Warrant of Arrest.

On March 23, 1963, at 2:30 A.M. -- which was eight days after the arrest warrant was issued and almost a month after the last alleged purchase -- appellant was arrested in front of Brown's Restaurant, 1906-14th Street, Northwest, by Detectives Brewer and Bertram F. Fogel. Tr. 47-48, 53-54. The arrest was made alone by the two officers, neither of whom had ever before seen appellant but who relied for identification upon police photographs which had been identified and supplied to them by Private Moore, the alleged purchaser of the narcotics. Tr. 51.

The testimony of one of the arresting officers, Detective Fogel, was that a cigarette containing what subsequently was determined to be marihuana was taken from the person of appellant shortly after his arrest. Tr. 54-55.

One of the arresting officers, Detective Fogel, was permitted to testify at trial as to certain oral statements made by appellant shortly after his arrest. Tr. 57-58. According to this witness, appellant stated that earlier in the year he had observed "narcotic drug addicts and what he knew as pushers" "stash their heroin" in an alleyway in the 1900 block of 14th Street, Northwest; and that on one occasion, appellant admitted, he had

"picked up the stash, which ended up to be decks of heroin. He said he held them for a few days to make sure there would be no heat placed on him, at which time he sold them for \$10.00 per bag.

"I asked him did he remember who he had sold them to. He said he did not. And I said then, is it a possibility that you could have sold them to a police officer, if you don't know everybody you sold them to. He said there was a possibility." (Tr. 57-58).

Appellant's motion to strike this testimony was denied.

Tr. 123.

Appellant was brought before a United States Commissioner for a preliminary hearing the same morning (March 23, 1963). The preliminary hearing was successively continued to April 9, May 2, and May 28, 1963, on appellant's motion so that he could have time to obtain his own counsel. R., Commissioner's Record of Proceedings.

When the preliminary hearing was resumed on May 28, 1963, appellant was represented by a member of the Legal Aid Agency. R., Commissioner's Record of Proceedings. Probable cause was found and appellant was remanded to custody.

On June 18, 1963, the grand jury returned a seven-count indictment against appellant (R., Indictment), charging him, in three counts each, with illegally selling narcotic drugs on February 27th and 28th [not in pursuance of a written order on a Treasury Department form (28 U.S.C. § 4705), not from the original stamped package (28 U.S.C. § 4704(a)), and after the narcotics had been illegally imported (21 U.S.C. § 174)], and, in one count, with failure to pay the marihuana transferee tax with respect to the marihuana cigarette in his possession on March 23, 1963 [28 U.S.C. § 4744].

Being unable to make bond appellant was still in custody on June 21, 1963 -- over three months after his arrest -- when he was arraigned (R., Plea of Defendant) under the indictment of June 18th. On the previous day, June 20th, the District Court had appointed counsel to represent appellant (R., Order Appointing Counsel to Defend),

in response to appellant's Affidavit in Support of Application to Proceed Without Prepayment of Costs filed on June 19, 1963.

On the same day appellant was arraigned without counsel and on the day after counsel had been appointed to represent him, that is, on June 21, 1963, appellant was interrogated in the rotunda of the District of Columbia Jail by Walter M. Morris, an agent with the Federal Bureau of Narcotics. Tr. 96-97. At appellant's trial agent Morris described the interview as follows (Tr. 97):

"A I asked him if he had any official order forms that are issued by the Government granting him permission to have marihuana in his possession. And he said he hadn't heard of any such order forms and he didn't have those papers."

There is nothing in the record which even suggests that Morris identified himself to appellant or informed him of the nature and purpose of his questions or advised him of his right to call his court-appointed attorney before answering this "notice and demand." Appellant's appointed trial attorney had not in fact been notified of the interrogation and did not learn of it until much later. Nonetheless, appellant's motion to strike Morris' testimony was denied. Tr. 164-65.

Appellant's trial commenced on February 24, 1964. Appellant's defense in support of his plea of not guilty to the charge that he had made illegal sales on February 27 and 28, 1963, was that he had never seen Private Moore, the alleged purchaser and that on both occasions he was in the apartment of a female companion. An attempt was also made to impeach Private Moore by showing that he had falsely accused appellant of receiving Metropolitan Police Department Advance Funds for the purchases as a means of covering up shortages of these funds which possibly had been diverted by Moore to other purposes.

Appellant's alibi was attempted to be established by the testimony of three persons, two of whom were unable to supply convincing testimony because of their admittedly limited observation of appellant on the afternoons in question. */ Appellant's third alibi witness,

*/ See testimony of Mr. Carter [Tr. 126 (February 27), 129-30 (February 28)], and Miss Roberts [Tr. 150-51 (February 27)]. Miss Roberts did state unequivocally that appellant was in her apartment at 4:30 P.M. on February 28th (Tr. 153), but her testimony was no doubt weakened because of a showing of interest and possible bias (Tr. 149, 154, 156, 158, 162).

Mrs. Estelle Robinson, was, however, able to state definitely that appellant was present in her rooming house several miles away from the place of the alleged sales at the times they allegedly occurred. Tr. 138, 139. But on cross-examination of Mrs. Robinson the prosecuting attorney was permitted, over strenuous objection, to pursue the following line of inflammatory and highly prejudicial questioning (Tr. 142-44):

"Q Ma'am, are you the same Estelle Robinson who was convicted in 1940 of receiving stolen property?

"MR. MOORE: Objection, Your Honor.

"THE COURT: The objection is overruled.

BY MR. SIDMAN:

"Q And received a sentence of from one to two years?

"A I did?

"Q Yes, you. Are you the --

"A No, sir.

"Q Are you the same Estelle Robinson convicted in 1943 of selling liquor without a license?

"A No sir.

"MR. MOORE: Objection.

"THE WITNESS: I never was convicted of nothing.

"BY MR. SIDMAN:

"Q Perhaps it would refresh your recollection. The date of the conviction was March 14, 1940. You were then forty-

five years old, you were convicted in Criminal No. 16544 and No. 65457, you received a sentence of one to two years, and you were put on probation.

"A I don't remember that.

"Q You don't remember that?

"A No, sir. I was locked up and I was not convicted.

"Q What were you then?

"A I was just turned out.

"Q You were released?

"A Yes, sir.

"Q And you say in 1943, April 23, 1943, you were not convicted of selling liquor without a license, and you received a thirty-day sentence or a \$25.00 fine for four different violations of liquor laws?

"A No sir.

"Q And the arresting officer in two cases was Officer Causing and in two other cases it was Officer Reid?

"A I was not, no, sir. I never did a day in prison in my life.

"Q Did you pay the fine?

"A I don't remember doing that now.

"Q You don't remember?

"A No sir."

Appellant's motion to strike this testimony was denied by the trial court. Tr. 143-44.

In an attempt to establish whether Private Moore's transfer from the Narcotics Squad to duty as a patrolman following a Police Department investigation was the result of his mishandling of Advance Funds, appellant's court-

appointed trial counsel subpoenaed the records of the investigation. */ The subpoena was ignored and trial counsel for appellant complained to the court that the subpoenaed documents had not been furnished. Tr. 4. The prosecuting attorney then moved to quash the subpoena on the grounds that the materials sought were "irrelevant." Tr. 5. After argument by counsel the trial court ordered that the disputed materials, consisting of a large number of vouchers covering money advanced to Private Moore for making purchases and a file of written statements which was conceded to be an inch thick, be delivered to his chambers. The trial judge announced that "I will take a look at the record myself to see whether there is anything there that you [appellant's trial counsel] have a right to." Judge McGarraghy, Tr. 10.

After a short recess (Tr. 12), the trial judge returned to court and announced, first, that the information

*/ Trial counsel for appellant had been alerted to this possible source of impeaching information by a newspaper article in the Washington Post on December 14, 1963. Private Moore's partner, one Detective Virgil J. Hood, had been suspended from duty on the Narcotics Squad as a result of the investigation. Detective Hood did not otherwise figure in the trial.

contained in the vouchers was irrelevant and, second, that the inch-thick file of statements (which included a statement by Private Moore himself) related to "another matter not related to this matter" and thus that appellant's counsel had no right to inspect or use any of the documents. Tr. 12-13. Trial counsel for appellant noted the grounds for his exception in the following exchange with the trial judge (Tr. 13):

"MR. MOORE: May I make an exception to the ruling? May I note one of the reasons for it?

"THE COURT: Yes.

"MR. MOORE: These statements comprise a file which would be conservatively an inch thick.

"THE COURT: I would think so, yes.

"MR. MOORE: Containing many pages, and I do not believe that Your Honor has read those statements in their entirety. So there, I believe --

"THE COURT: I think that is a fair statement to say I haven't read them all in their entirety. I did review the statement made by Mr. Moore carefully enough to determine that nothing in that statement relates to the case on trial today."

The court's ruling was made before the introduction of any evidence. Subsequent efforts by appellant's counsel to obtain the documents during trial were similarly unsuccessful. See infra pp. 43-45.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

The relevant parts of the constitutional provisions and statutes involved, being lengthy, are set out in the separate Appendices A(1) through A(8), infra, pursuant to Rule 17(b)(6) of the General Rules of this Court.

STATEMENT OF POINTS

1. On the very day after appellant's trial counsel was appointed to defend him, a Federal Narcotics Bureau agent, without notifying appellant's counsel, extracted damaging admissions from appellant concerning his possession of the order form for marihuana required by 26 U.S.C. § 4742. This occurred almost three months after appellant had been arrested and charged with illegal possession of marihuana and three days after appellant had been indicted for this offense by the grand jury. Due to the circumstances of this secret interrogation, appellant was not enabled to be informed of the peculiar operation of 26 U.S.C. § 4744(a) which made his failure to produce the § 4742 order form, together with possession of marihuana, presumptive evidence of guilt. Appellant was thus denied the effective assistance of counsel guaranteed him by the

Sixth Amendment. In addition, the narcotics agent's demand for the production of the order form was, under these circumstances, not the "reasonable notice and demand" required by 26 U.S.C. § 4744(a). Finally, this is the type of situation in which this Court has stated that it will require exclusion of admissions obtained in the absence of counsel in the exercise of this Court's supervisory power over the administration of criminal justice in the District of Columbia. The trial court therefore erred in denying appellant's motion to strike the damaging testimony of the narcotics agent and in subsequently failing to direct a verdict for appellant on the marihuana possession charge since, without such testimony, the evidence on this charge was not sufficient to go to the jury. (Count 7).

2. One of the officers who arrested and interrogated appellant was permitted to testify as to admissions made by appellant with respect to other crimes committed by him not related to the two alleged offenses of selling heroin for which appellant was indicted. The effect was to permit appellant to be convicted on evidence of crimes other than those with which appellant was charged. The court plainly erred, therefore, in denying appellant's motion to strike this testimony. Since the prejudice caused appellant by this error was substantial as to all of the charges, a new trial is required. (All counts).

3. Over the strenuous objection of appellant, the court below permitted the prosecution to impeach appellant's chief alibi witness by questioning her about criminal convictions allegedly obtained against her over 20 years ago for receiving stolen property and for selling liquor without a license even though the witness denied the existence of any criminal record or of the convictions to which the prosecuting attorney testified. This damaging, inflammatory, highly prejudicial and completely unsubstantiated line of questioning effectively destroyed the credibility of appellant's alibi defense. The questions were completely improper as impeachment since the witness consistently denied the existence of the alleged convictions and since the alleged convictions were never proved. The trial court therefore erred in overruling appellant's objections to this questioning, an error which requires reversal of the subsequent convictions. (Counts one through six).

4. The prosecution had possession of documents possibly concerning a Police Department investigation of misuse of funds by the prosecution's chief witness, an undercover agent who allegedly purchased heroin from appellant on two occasions, which documents appellant

attempted to have produced. After an in camera review which concededly did not cover all the documents and which did not consider the contents of the documents in the context of any trial testimony, the trial having not yet begun, the trial judge refused to order production of the documents on the grounds that they were irrelevant to the subject matter of the case. The procedures followed and the rulings given by the court below violated the statutory right of appellant to inspection under the Jencks Act and the substituted review of the documents by the trial judge was patently insufficient to correct this error. In addition, the trial court erroneously prohibited cross-examination of the prosecution's chief witness as to his dispositions of funds advanced to him for the purchase of narcotics. These interrelated errors of the court below vitiate the convictions involving the alleged sales of heroin made by appellant and require a new trial. (Counts one through six).

SUMMARY OF ARGUMENT

1. After being indicted and while in jail awaiting arraignment, appellant was secretly interrogated by a federal narcotics agent who deliberately elicited damaging admissions from appellant in the absence of his court-appointed counsel. There is no evidence that the narcotics agent identified either himself or the purpose of his mission -- which was to make the notice and demand for the official marihuana order forms required by 26 U.S.C. § 4742 -- nor that he cautioned appellant as to the consequences of his answer or informed him of his right to have his court-appointed counsel present.

It is clear from Massiah v. United States, 377 U.S. 201 (1964) and this Court's holding in Queen v. United States, ___, U.S. App. D.C. ___, 335 F.2d 297 (decided June 29, 1964), that the admissions thus elicited could not be used against appellant without depriving him of his right to counsel under the Sixth Amendment. In addition, such a notice and demand is not "reasonable" within the meaning which should be assigned to 26 U.S.C. § 4744(a). Finally, recent decisions of this Court state that under circumstances such as those presented the Court will reverse in the exercise of its supervisory powers over the administration of criminal justice in the District of Columbia.

2. The officer who arrested appellant was permitted to tell the jury of appellant's statements that he had found a stash of heroin and had sold packages from it to various unidentified persons "earlier in the year." This amounted to permitting evidence of other crimes to be admitted against appellant and under the well-settled rules of evidence was reversible error.

3. The trial court permitted the prosecuting attorney to cross-examine appellant's chief alibi witness in detail concerning alleged convictions obtained against her over 20 years previously, despite the fact that the witness initially and continuously denied the convictions. Under these circumstances, D.C. Code § 14-305 (Supp. III, 1964) and the applicable decisions required that independent proof of the alleged convictions be offered. This was not done and thus appellant's main defense was seriously prejudiced by unproved convictions of his chief alibi witness. The failure to strike this testimony requires a new trial.

4. Prior to and on two occasions during trial, appellant made demands for the production of statements made by the prosecution's chief witness. These statements, appellant believes, might have been useful in impeaching the witness by showing that he had a personal and financial interest

in furthering appellant's conviction. The trial judge ruled, before any of the witness' testimony had been heard and after a summary review of the disputed documents, that the documents did not "relate to the case" and therefore denied production. The court also prohibited appellant from inquiring into the witness' personal finances or into whether he had made any statements in connection with the investigation of a fellow police officer who had been suspended from the force. These rulings denied appellant his rights under the Jencks Act, 18 U.S.C. § 3500, to the production of statements relevant to the witness' testimony. Moreover, the court's strictures on cross-examination denied appellant his right to develop further predication for the production of additional Jencks statements by the witness.

ARGUMENT

- I. IN VIEW OF ALL THE CIRCUMSTANCES, THE ADMISSIONS BY APPELLANT ON JUNE 21, 1963, THAT HE DID NOT HAVE THE OFFICIAL MARIHUANA ORDER FORMS REQUIRED BY 26 U.S.C. § 4742 SHOULD HAVE BEEN EXCLUDED SINCE THE ADMISSIONS WERE MADE WHILE APPELLANT WAS BEING DENIED HIS CONSTITUTIONAL, STATUTORY, AND DECISIONAL RIGHTS TO THE ASSISTANCE OF COUNSEL.* /

The Sixth Amendment to the Constitution requires that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Moreover, 26 U.S.C. § 4744(a) requires that the demand for the official marihuana order form be "reasonable." Finally, this Court has recently held that admissions or confessions obtained under circumstances indicating a denial of the right to counsel will be excluded under this Court's general supervisory power over the administration of criminal justice in the District.

It is submitted that appellant, an indigent defendant who had been arrested almost three months previously, who had been indicted three days previously, and who on the day before the statutory notice and demand was made was appointed counsel to defend him, had the constitutional, statutory and decisional right to the advice and assistance of counsel before he was made to respond to the 26 U.S.C.

* / With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 96-97 and 164-65.

§ 4744(a) notice and demand by the federal narcotics agent Moore for the production of the official marihuana order form required by 27 U.S.C. § 4742. The absence of counsel, under these circumstances, required that the appellant's admissions be excluded.

A. The Alleged Admissions Made by Appellant on June 21, 1963, Were Inadmissible Since They Were Made While Appellant Was Being Denied His Constitutional Right to Counsel.

Controlling and dispositive here is the recent Supreme Court case of Massiah v. United States, 377 U.S. 201 (1964), which has been applied by this Court in a case on all fours with the present case. Queen v. United States, ___ U.S. App. D.C. ___, 335 F.2d 297 (decided June 29, 1964) (per curiam). And see Escobedo v. Illinois, 378 U.S. 478 (1964).

Reaffirming its prior decisions, see, e.g., Spano v. New York 360 U.S. 315 (1959), the Supreme Court in Massiah stated that under the right to counsel guarantee of the Sixth Amendment:

" . . . We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. . . ." (377 U.S. at 206).

The facts in Massiah showed that the petitioner had been arrested and indicted with several co-defendants for violating the federal narcotics laws and subsequently had been released on bail. While he was free on bail and represented by retained counsel, government agents secured the consent of one of the petitioner's co-defendants to install a radio transmitter in the co-defendant's automobile. Through this arrangement a government agent was enabled to overhear damaging statements made by petitioner in the absence of his attorney. The agent was permitted, over the petitioner's objection, to testify to these damaging statements at the trial which resulted in petitioner's conviction.

On these facts, the Supreme Court held that such incriminating statements deliberately elicited by government agents from an indicted defendant, in the absence of his attorney, deprived the indicted defendant of his right to counsel under the Sixth Amendment. In reaching its decision, the Court relied in part upon the concurring opinion of four Justices in Spano v. New York, 360 U.S. 315, 324, 326 (1959), who had pointed out that the Constitution required reversal of a conviction, obtained by means of a confession elicited from the defendant after he was indicted and while he was being represented by an attorney, on the

"sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. It was pointed out that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'" Massiah v. United States, 377 U.S. 201, 204 (1964) (Emphasis supplied).

A review of the facts in the recent, per curiam and unanimous opinion of this Court in Queen v. United States, ___ U.S. App. D.C. ___, 335 F.2d 297 (decided June 29, 1964), demonstrates beyond question that that case requires reversal of appellant's conviction on count seven. The appellant in Queen had been arrested and taken before a United State Commissioner who released her on bail and continued the preliminary hearing so as to allow her to obtain counsel. On the day the hearing was to resume, the appellant again appeared at the office of the commissioner, but without counsel. The police officer who had arrested her approached her and escorted her, with her assent, to another room where he and two other officers questioned her alone. The officer advised appellant of her right not to make a statement and that, if made, a statement

might be used against her. The officer testified that he knew appellant had requested a continuance to obtain counsel and that she said to him prior to questioning that she was in the process of obtaining counsel. During the ensuing interrogation, appellant made certain incriminating statements which were used against her at her trial.

On those facts, this Court held that the conviction must be reversed (___ U.S. App. D.C. at ___, 335 F.2d at 298):

"In the course of this secret interrogation, in the absence of counsel, and during the continuance granted for the very purpose of enabling counsel to be obtained, the self-incriminating statements were elicited. The result of this intervention by the officers was to frustrate the right of the accused to have the assistance of counsel until by reason of those extrajudicial proceedings such assistance would be rendered fruitless if the statements thus obtained could be used to convict. For this reason, and notwithstanding the absence of an indictment, the case clearly comes within the reasoning which led to the exclusion of the evidence in Massiah and Escobedo. And see Ricks v. United States, 118 U.S. App. D.C. ___, ___ F.2d ___."

The facts in the instant case, if they differ from those in the Queen case, are even stronger. In Queen the accused had not yet been indicted, in fact, she had not yet been preliminarily examined; appellant here had been indicted

several days before the secret interrogation. In Queen the accused had not yet obtained counsel, although her interrogators knew that she was actively seeking counsel; appellant here had been appointed counsel the day before the interrogation and two days previously appellant had filed with the Clerk of the District Court his "Affidavit in Support of Application to Proceed Without Prepayment of Costs" (R., Affidavit of June 19, 1963), actions of public record of which the government must be held to have been cognizant. In Queen the accused was cautioned of her right to remain silent; there is no pretense here that appellant was given even this minimal advice at the time of his secret interrogation.

Especially is the guidance of counsel, which was denied appellant, necessary in a narcotics prosecution in which the government intends to rely upon the presumption of guilt supplied by 26 U.S.C. § 4744(a). ^{*}/ As already noted, Section 4744(a) provides that if the government proves

^{*}/ The text of 26 U.S.C. § 4744(a) appears in Appendix A(3), infra at page A-3.

that the accused had marihuana in his possession and that he failed, after reasonable notice and demand, to produce the order form required by 26 U.S.C. § 4742, it will be presumed that the defendant had acquired such marihuana without paying the marihuana transfer tax imposed by 26 U.S.C. § 4741(a). If the prosecution cannot or does not present the facts necessary to bring this presumption of guilt into operation, then it must prove each of the separate elements of the offense. See, e.g., Symons v. United States, 178 F.2d 615, 621 (9th Cir.), cert. denied, 339 U.S. 985 (1950). If the accused permissibly may be interrogated as to his possession of official order forms under circumstances such as those presented here, court-appointed counsel will find that the prosecution already has obtained an evidentiary advantage which in most cases effectively precludes any defense. This is precisely the type of "trial before trial" condemned by the concurring Justices in Spano, again by a majority of the Supreme Court in Massiah, and most recently by this Court in Queen.

Moreover, it is obvious that appellant would have been advised by counsel, if he could have consulted counsel, not to answer Morris' questions in the fashion testified to by Morris. Any number of alternatives were open to appellant,

none of which he could have been aware without the familiarity with legal process that only an attorney could have afforded. Compare White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him") For example, counsel could have insisted that the notice and demand be put in writing; here the notice and demand came orally. He might have insisted upon a reasonable time within which to produce the order forms; here the demand called for instantaneous production of the forms. In any event, "any lawyer worth his salt" */ would have advised appellant -- as agent Morris does not pretend to have advised him -- of his right to remain silent, at least until the consequences of his response had been considered.

Instead, appellant -- incarcerated, indicted, indigent, unrepresented and uncounselled, without warning or caution -- was asked to produce the official forms on the spot. This is precisely the type of situation in which

*/ Watts v. Indiana, 338 U.S. 49, 59 (1949).

the Supreme Court has indicated that the need for counsel is greatest -- a step in the proceedings against appellant to which great importance attached. See, e.g., White v. Maryland, 373 U.S. 59 (1963); Council v. Clemmer, 85 U.S. App. D.C. 74, 76, 177 F.2d 22, 24, cert. denied, 338 U.S. 880 (1949). Since he was not afforded such counsel, the admissions deliberately elicited from appellant were barred by the Sixth Amendment from being admitted into evidence at his trial. The failure of the trial court to exclude them constitutes reversible error.

- B. Agent Morris' Interrogation Was Not Made Pursuant to a "Reasonable" Notice and Demand as Required by 26 U.S.C. § 4744(a) and Thus the Ensuing Admissions Were Not Competent to Establish a Presumption of Guilt.

As already stated, the uncontradicted evidence at trial shows that narcotics agent Morris secretly interrogated appellant in jail on the very day following the appointment of counsel by the trial court to represent him. Indigent and unadvised, appellant admitted that he had never heard of the official narcotics order forms required by 26 U.S.C. § 4742 and that he did not have any such order forms. It is clear from the rulings of the trial court and its instructions to the jury (Tr. 179) that it considered,

and thus impliedly ruled, that the evidence of these admissions made out a prima facie case of presumptive guilt under 26 U.S.C. § 4744(a).

But the evidence clearly shows that the notice and demand served by Agent Morris was made at a time and under such circumstances that it cannot meet the requirement of reasonableness of Section 4744(a). It has already been shown that under the Sixth Amendment as interpreted by the Supreme Court in Massiah v. United States, 377 U.S. 201 (1964), and as applied by this Court in the controlling case of Queen v. United States, ___ U.S. App. D.C. ___, 335 F.2d 297 (decided June 29, 1964), the admission into evidence of the statement made by appellant on June 21, 1963, was clearly error. And there need be no elaborate citation of authority for the proposition that, where possible, courts will avoid the decision of a constitutional question where other adequate and non-constitutional grounds for decision exist.

Against the background of the principle of the avoidance of constitutional questions, and against the background of the serious constitutional question raised by the interrogation of appellant on June 21, 1963, it is submitted that the requirement of Section 4744(a) that

the demand and notice be "reasonable" can mean no less than that the notice and demand must be made at such time and under such circumstances that the accused's right to counsel is not impaired.

C. The Circumstances of the Secret Interrogation of Appellant and the Use of Ensuing Admissions Against Him at His Trial Require Reversal Under the Supervisory Powers of This Court.

This Court just recently has held that taking an accused before a grand jury without notifying his attorney required the exercise of the Court's supervisory power over the administration of criminal justice in the District of Columbia, and ordered exclusion of the accused's grand jury testimony in determining whether there was probable cause to indict. Jones & Short v. United States, ___ U.S. App. D.C. ___, ___ n.18, ___ F.2d ___, ___ n.18 (decided July 16, 1964). The same result was reached for the same reason in a similar situation in Ricks v. United States, ___ U.S. App. D.C. ___, ___, 334 F.2d 964, 971 (decided June 9, 1964) (admissions obtained during continuance of preliminary hearing inadmissible; continuance was for purpose of permitting accused to obtain counsel). On all significant points this case is the same as the Short case and the Ricks case and the same principles require

exclusion of the appellant's admissions to agent Moore. The failure of the trial court so to do clearly constituted reversible error.

D. Absent Appellant's Admissions, There Was No Evidence to Go to the Jury on Count Seven.

The cases decided under 27 U.S.C. § 4744(a) and its predecessors clearly establish that if the prosecution does not or cannot invoke the evidentiary presumption provided in that section, it must present evidence sufficient to establish all the essential elements of the offense and cannot rely upon the statutory presumption to fill up gaps in its proof. See United States v. Turner, 132 F. Supp. 336, 339 (N.D. Ill. 1955); Symons v. United States, 178 F.2d 615, 621 (9th Cir.), cert. denied, 339 U.S. 985 (1950). That is, if the two facts of a) possession, and b) failure to produce the official marihuana order form upon reasonable notice and demand, are not made out by competent evidence, then the prosecution must prove: a) that the accused was a transferee, b) that he was required to pay the transfer tax, and c) that he obtained marihuana without paying the transfer tax.

The competent evidence presented by the prosecution at appellant's trial failed entirely to establish anything other than that appellant was in possession of marihuana on

March 23, 1963. The record contains not a scintilla of evidence that appellant was a transferee. For all that appears, appellant could have obtained the marihuana in any number of ways and by any number of unilateral acts -- growing, finding, etc. -- which would not constitute a "transfer" within the definition supplied by 26 U.S.C. § 4761(4). Nor is there any evidence that appellant was required to pay the tax imposed by 26 U.S.C. § 4741. This follows necessarily from the fact that appellant was not shown to have been a transferee at all. Finally, there was a complete failure of proof that appellant had failed to pay the tax. If agent Moore's improper testimony is rejected and thus if the statutory presumption of guilt is removed, the state of the trial record lends just as much support to the hypothesis that appellant had registered under 26 U.S.C. § 4751 and paid the tax under 26 U.S.C. § 4741 as it lends to the suggestion that he did not. See Symons v. United States, 178 F.2d 615, 621 (9th Cir.), cert.denied, 339 U.S. 985 (1950).

In this state of the record, it is clear beyond cavil that, absent the presumption under 26 U.S.C. § 4744(a), there is no evidence to support appellant's conviction under Count 7 of the indictment. Since, as already established, the testimony of agent Morris must be disregarded and thus

since the 26 U.S.C. § 4744(a) presumption never became operative, there was no evidence to go to the jury on the essential elements of Count 7. Lacking any evidence the conviction under Count Seven must be reversed.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO STRIKE THE ARRESTING OFFICER'S TESTIMONY AS TO APPELLANT'S ALLEGED ADMISSIONS AFTER HIS ARREST THAT HE HAD COMMITTED OTHER CRIMES UNRELATED TO THE CRIMES FOR WHICH APPELLANT WAS BEING TRIED. */

Officer Fogel, one of the two arresting officers and the officer who had interrogated appellant after his arrest, was permitted to testify to the following alleged statements made by appellant (Tr. 57-58):

"He stated, number one, that he was not a narcotic drug user. Number two, he stated that earlier in the year he had been hanging in the 1900 block of the 14th Street, Northwest, around a restaurant known as the Pig and Pit. There is a driveway that runs through to the rear of those premises, and he said he had seen narcotic drug addicts and what he knew as pushers in and out of that alley; and he said he would observe them go to the rear of the restaurant in the alleyway, and they would -- quoting him -- stash their heroin, which means secreting it in some way, shape or form.

*/ The portion of the reporter's transcript which appellant wishes the Court to read are quoted in the opening paragraph of the argument under Point II.

"He said on one occasion he observed this happen and after the party had left, that he went back and picked up the stash, which ended up to be decks of heroin. He said he held them for a few days to make sure there would be no heat placed on him, and at which time he sold them for \$10.00 per bag.

"I asked him did he remember who he had sold them to. He said he did not. And I said then, it is a possibility that you could have sold them to a police officer, if you don't know everybody you sold them to. He said there was a possibility."

Appellant's subsequent motion to strike this testimony was denied by the trial court. Tr. 123. */

The rules governing the admissibility of evidence of crimes other than those for which the accused is on trial are well settled. The statement in Pyle v. United States, 81 U.S. App. D.C. 209, 212, 156 F.2d 852, 855 (1946), is representative:

"In O'Brien v. United States, [69 U.S. App. D.C. 135, 99 F.2d 368, 369 (1938)] this court said:

*/ The tactic of the prosecution to introduce other evidence of a similar nature, dealing with the reputation of the 14th and U Streets area as a place where addicts and dope peddlers congregate, was partially thwarted at another point by appellant's court-appointed trial attorney. See Tr. 42. The damage done to appellant by these tactics is, of course, not precisely assessible but was certainly substantial.

"We have said in a number of cases that distinct and different crimes independent of that charged may not be used to establish guilt. *Borum v. United States*, 61 App. D.C. 4, 6, 56 F.2d 301. And we have also said that, when such evidence is admitted and shown in the record, we will presume it to be injurious. *Parlton v. United States*, 64 App. D.C. 169, 173, 75 F.2d 722.' The word 'crime,' as commonly understood in this jurisdiction, includes both felonies and misdemeanors. [*Murray v. United States*, 53 U.S. App. D.C. 119, 288 Fed. 1008 (1923), *Bostic v. United States*, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937).] To receive evidence in a criminal trial to the effect that the defendant has committed a misdemeanor wholly foreign to the charge then under inquiry is equally as erroneous as to admit evidence of the commission of an unrelated felony." (Footnotes in brackets.)

The rule in criminal trials prohibiting the introduction into evidence of crimes committed by the defendant other than the crime for which he is on trial has an unassailable policy foundation. * Unless a tight rein is kept on evidence tending to portray the accused as a despicable, antisocial and morally corrupt person, a

* / D. C. Code § 14-305 (Supp. III, 1964) (see Appendix A(8), *infra*, at page A-8), which permits proof of a conviction to affect the credibility of a witness, does not, of course, apply where no conviction has yet been obtained by the government and where, as here, the accused has not taken the stand as a witness.

prosecution well might become a trial of the defendant's character or reputation rather than an objective analysis of the specific acts with which he has been charged. See 1 Wigmore, Evidence § 47, at pp. 454, 455 (3d Ed. 1940). Whether the character of the present appellant is good or bad might, of course, have some probative value in determining whether he was disposed to crime and thus whether he would have been likely to have committed the violations charged. But for reasons of what Dean Wigmore has aptly named "auxiliary police," see 1 Wigmore, Evidence § 57, at p. 454 (3d Ed. 1940), evidence of such a character must be kept from the jury despite whatever probative merit it might otherwise have because of its probable and uncontrollable prejudicial effect in the minds of the jurors. Furthermore, if proof of unrelated crimes would be admissible, the accused would be required to come to court prepared to deny, defend or explain each of the illegal acts that he had ever performed, or has been said by a government witness to have performed, during his entire lifetime. And the fact that such unfortunate acts could be established beyond doubt does not make them any more admissible; in fact, as in the common law of libel, the greater the truth, the greater the probability of irreparable harm to the defense. Until jurors are discovered that can judge the criminality of acts with

the dispassionate objectivity of machines, evidence of this nature should not be brought before them.

There can be no contention that the alleged admissions of appellant involved anything but unrelated and independent crimes. First, the admissions had nothing whatever to do with the marihuana charge. Second, the charges (counts one through six) for selling heroin were confined in the indictment, as they were required to be, to offenses allegedly committed on February 27 and 28, 1963. But there is no indication in appellant's alleged admission that any sales were made on these dates or even, for that matter, during the month of February. The only indication which permits the admitted sales to be fixed in time is appellant's alleged reference to an unspecified time "earlier in the year," which presumably means earlier in 1963. This was clearly insufficient, however, to fix the date of the alleged transactions at a time on or about February 27 or 28. The unspecified period allegedly mentioned by appellant could, of course, have been any day from January 1 until defendant's arrest on March 23, or any number of these days together.

This is clearly not a case such as Borum v. United States, 61 U.S. App. D.C. 4, 6, 56 F.2d 301, 303 (1932), where the Court approved the admission of "even a

collateral or extraneous offense, when it forms a link in a chain of circumstances culminating in the offense charged" The evidence permitted there showed that the defendants had gone to Baltimore to obtain bootleg alcohol and had equipped their automobile with a smokescreen device to evade detection. Upon returning to Washington, they parked the car in an alleyway where it was discovered by a policeman who one of the defendants then shot. On the subsequent trial for murder this Court held that the illegal purchase in Baltimore could be shown to establish a general scheme, a single purpose. 61 U.S. App. D.C. at 6, 56 F.2d at 303. But this exception to the established general rule clearly does not apply in the present case. There was no evidence whatever connecting the allegedly admitted sales of heroin with the sales on the 27th and 28th.

Because of the error in permitting this evidence to go to the jury, which, as this Court has stated, "we will presume . . . to be injurious," Pyle v. United States, 81 U.S. App. D.C. 209, 212, 156 F.2d 852, 855 (1946); O'Brien v. United States, 69 U.S. App. D.C. 135, 99 F.2d 368, 369, cert. denied, 305 U.S. 562 (1938), appellant's conviction must be reversed and a new trial must be had. Because this error infected the entire defense, the reversal must be of all the counts.

III. THE PERMITTED DISCREDITING OF APPELLANT'S ALIBI WITNESS, MRS. ROBINSON, WAS REVERSIBLE ERROR BECAUSE THE ALLEGED CRIMINAL CONVICTIONS USED AS IMPEACHMENT WERE DENIED BY THE WITNESS AND WERE NEVER PROVED BY THE PROSECUTION. */

A. The Mode of Cross-Examination.

The prosecuting attorney at trial attacked the credibility of appellant's central alibi witness, Mrs. Estelle Robinson, by purporting to show on cross-examination that she had been convicted 20 years previously of receiving stolen property and selling liquor without a license. Tr. 142-43. **/ Mrs. Robinson denied the fact of the convictions initially and throughout the cross-examination. The cross-examination, conducted under the guise of "refreshing the recollection" of Mrs. Robinson, for the most part consisted of testimony by the prosecutor as to alleged details of the convictions, such as the length or amount of the sentences received, probation, the number of counts involved, and the names of the arresting officers. These additional details

*/ With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 126-30 (Carter), 142-44 (Mrs. Robinson) and 149-62 (Roberts).

**/ The use of prior convictions to affect the credibility of a witness is authorized by D.C. Code § 14-305 (Supp. III, 1964). The statute authorizes only "the fact of conviction" (emphasis supplied), however, and does not authorize its mere unsubstantiated allegation.

of the alleged convictions were, of course, highly prejudicial and would have been inadmissible themselves even if the convictions had been admitted by the witness or otherwise proved as facts. See McCormick, Evidence § 43 (1954 Ed.); 3 Wigmore, Evidence § 987 n.1 (3d Ed. 1940).

The trial court overruled appellant's initial objections (Tr. 142) and denied his motion to strike at the termination of this cross-examination. Tr. 143-44. No further evidence on this matter was introduced by either party.

B. Permitting the Cross-Examination Was Reversible Error.

The questions posed after Mrs. Robertson's initial denials of the convictions contained statements of facts which strongly suggested that the prosecutor was reading from an official document setting out the fact of the prior convictions. But, if prior convictions had been obtained, it clearly was the duty of the prosecutor, and the trial court should have required him, to cease his line of questioning and introduce competent evidence at a later point to show that Mrs. Robinson's denial of convictions was false.

A coordinate appellate court in this jurisdiction just recently has condemned precisely this type of discrediting questioning. In Cormier, v. United States, 137 A.2d 212 (D.C. Munic. App. 1957), the court held that the use

of FBI records to show convictions denied by the witness was "clearly erroneous" and, since it "was spread over many pages of the record," the questioning "could hardly fail to have a prejudicial effect on a jury." (137 A.2d at 215-16). The court insisted that the only permissible method of proving a criminal record, once denied, was by introducing into evidence the certificate of court provided for in D.C. Code § 14-305 (Supp. III, 1964), the text of which appears in Appendix A(8), infra, at page A-8.

This Court held in Clainos v. United States, 82 U.S. App. D.C. 278, 163 F.2d 93 (1947), that alleged convictions which were denied by a witness whom the prosecution sought to discredit could not be attempted to be proved by means of an official police record. (82 U.S. App. D.C. at 280, 163 F.2d at 595). In the present case not even so much as a police record was introduced to lay a foundation for questioning Mrs. Robinson about the alleged convictions. Since Clainos is unquestionably the law, it must a fortiori be concluded that the unsubstantiated and unsworn statements of a prosecutor cannot be permitted to establish the fact of conviction. Compare Clifton v. United States, 54 U.S. App. D.C. 104, 106, 295 Fed. 925, 927 (1923). See Wanamaker v. Lewis, 173 F. Supp. 126, 130-31 (D.D.C. 1959) (fatal error even to inquire whether witness had been convicted of a felony where no effort was made to prove the conviction after the witness' denial).

That this "evidence," erroneously admitted by the court below, was highly prejudicial to appellant's defense is obvious from a reading of the Trial Transcript. Of appellant's three alibi witnesses, only Mrs. Robinson stated with certainty that appellant had been elsewhere at the exact time of the alleged offenses on February 27th and 28th. Appellant's alibi witness Carter conceded that he could not place appellant away from the scene of the crimes at the times the prosecuting witness had said they occurred. Carter, Tr. 126, 129-30. The witness Roberts had no personal knowledge of appellant's whereabouts on the afternoon of the 27th. Roberts, Tr. 150-51. And Miss Roberts' otherwise favorable testimony concerning the afternoon of the 28th was doubtless weakened considerably by the prosecution's showing of her obvious interest in and possible bias toward appellant who was the father of her child (Tr. 149), her admitted common-law husband (Tr. 154), gave her financial support (Tr. 156), loved their baby (Tr. 158), and to whom she wanted nothing ill to happen (Tr. 162).

In short, the prosecution's discrediting of Mrs. Robinson effectively stripped appellant of his strongest defense and most probably contributed materially to his conviction on all of the counts. The trial court's refusal to prohibit this questioning at its outset or even to strike it after the damage had been done clearly requires a new trial.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR
(a) IN FAILING TO PROPERLY REVIEW THE POLICE
DEPARTMENT DOCUMENTS SUBPOENAED BY APPELLANT,
AND (b) IN PROHIBITING APPELLANT'S COUNSEL
FROM LAYING THE PROPER FOUNDATION FOR PRODUCTION
OF THE WITNESS' STATEMENT ON CROSS-EXAMINATION. */

A. Pre-Trial Proceedings.

Prior to trial, appellant's court-appointed attorney caused a subpoena duces tecum, to be served upon certain officials of the Metropolitan Police Department. The subpoena called for the production at trial of the Police Department's records in its investigation of Detective Virgil J. Hood and his previous partner, Private Rufus Moore. Moore, of course, is the indispensable prosecution witness who allegedly made the two narcotics purchases which are charged in counts one through six of the indictment. Hood and Moore apparently were working as partners at times during the early portion of 1963, but at the time of the alleged purchases from appellant on February 27th and 28th, Moore was accompanied only by a familiar narcotics informer and erstwhile addict, one Mr. Harris. Tr. 33-34.

Through a newspaper article which had appeared in December 1963, appellant's attorney had learned the report

*/ With respect to Point IV, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 4-15 (pre-trial hearing), 36-40 and 93.

that, following the police investigation, Hood had been suspended from the force and Moore had been transferred from the Narcotics Squad to duty as a uniformed private. Tr. 6-7. Therefore, in order to obtain information "for impeachment purposes" (B. G. Moore, Tr. 7) which would possibly show that the government's chief witness had "made purchases or alleged purchases [of narcotics with Police Department Advance Funds] which in fact have not been made" (B. G. Moore, Tr. 5, 9-10), the subpoena was issued.

The prosecuting attorney resisted the production of these records on the grounds that "the request is for material which is irrelevant to this trial" (Tr. 7). He stated that his "information" was that the reasons for Moore's transfer "had nothing to do with any malfeasance or misfeasance on the part of any other officer in the Narcotics Squad." Tr. 8.

After some searching (Tr. 8, 10-11), the documents, which no one in the Police Department had yet brought to court in response to the subpoena, were brought to the trial judge in his chambers. Tr. 12. The trial judge examined them and shortly thereafter returned to the courtroom. */

*/ The trial reporter's Transcript notes at this point that "(. . . a short recess was taken.)" Tr. 12. Counsel has been informed by appellant's trial counsel that the period of the recess during which the trial judge had the files was no longer than 15-20 minutes.

The documents apparently consisted of two files. */ One file contained a substantial number of vouchers covering moneys advanced to Moore for the purpose of making purchases of narcotics. Tr. 12. The trial judge's use of the term "voucher" indicates that Moore had signed these documents, but this is not clear from the record. The trial judge ruled that this file, in its entirety, "would not be relevant" (Tr. 12) and denied appellant's request for its production.

The second was an inch-thick file which contained **/ statements made by various members of the Police Department, including a statement made by Moore. Tr. 13. With respect to the statement in this file made by Moore, the court ruled that it did "not have any reference to the case on trial here. It relates to another matter not related to this matter." Tr. 13.

*/ Present counsel has not yet seen these files or their contents which, it is assumed, are presently in the custody of the Metropolitan Police Department and are being carefully preserved pending final disposition of appellant's asserted right to inspect all or some of the documents in them.

**/ From the trial court's description of this file, it is unclear whether the "statements made by various members of the Police Department" (Tr. 13) were the sole contents of the file or whether it contained other documents as well, such as substantially verbatim recitals of oral statements.

Counsel for appellant noted one of the reasons for his exception to this ruling (Tr. 13) by pointing out (in the exchange quoted supra at page 12) that the judge could not possibly have read all the documents during the time he had inspected them in camera. The trial judge readily agreed that he had, in fact, not "read them all in their entirety." Tr. 13.

B. Proceedings During Trial.

Private Moore was the prosecution's first witness and he testified to making two purchases of white powder from appellant on the 27th and 28th of February 1963. Had Moore's testimony not been believed by the jury, the government's case certainly would have failed. During his cross-examination, appellant's attorney attempted to delve into the circumstances surrounding Moore's transfer from the Narcotics Squad. Tr. 36-40. But all that could be elicited from the witness was that he had been transferred because his services were "no longer needed there" (R. Moore, Tr. 37); that to the best of his knowledge he had not been the subject of an investigation (Tr. 38); and that he had no idea approximately how much money he handled during the course of a year. Tr. 39.

Appellant's attorney attempted to question Moore whether prior to his transfer he had appeared in any investigation, including an investigation of another person. Tr. 37. But the court ruled that "if there were any investigation of anyone else, I don't see how it could possibly be material to this case . . ." (Tr. 38), and cut off this line of questioning. Attempting to shed light from still another angle, appellant's attorney sought to ask whether Moore had a checking or savings account (B. G. Moore, Tr. 39), but the court again cut off this line of questioning. Thus frustrated by rulings from the bench, appellant's attorney surrendered further efforts to elicit information from Moore:

"Q Officer, do you have a checking account or a savings account?

"THE COURT: What is the materiality of that, Mr. [B. G.] Moore?

"MR. [B. G.] MOORE: Your Honor, I want to go to the Court of Appeals on the ruling that we cannot bring out this article.

"THE COURT: I will sustain the objection.

"MR. [B. G.] MOORE: And I want to know where it is. Your Honor, I take exception to this.

"THE COURT: You have an exception to all my rulings. You don't need to take them." (Tr. 39-40).

After direct testimony and cross-examination of Moore were completed, proceedings were had out of the presence of the jury to consider the legality of the arrest and other matters raised by appellant. At the completion of these proceedings appellant's counsel again expressed his desire for production of the Police Department documents which contained statements made by the government's witness. This was again denied on the basis of the court's pre-trial ruling and without any further consideration of the disputed documents (Tr. 93):

"MR. [B. G.] MOORE: I think a lot of the testimony by Rufus Moore, namely, the contents of that file, should be available to me. You have ruled on that.

"THE COURT: I think I have ruled on that. I want to make sure the record is clear, that is all."

- C. Appellant's Court-Appointed Trial Counsel Took All the Steps Necessary to Invoke the Jencks Act Requirement that the Trial Court Make a Proper Inspection to Determine Whether the Hood Investigation Documents Were Producing.

The foregoing recitation of facts demonstrates quite clearly that appellant's court-appointed trial counsel, inexperienced in criminal procedure as he admitted himself to be, */ took all of the steps that were necessary in order

*/ See, e.g., Tr. 10, 53, 83, 84.

to require the trial court to hold the producibility hearing required by the Jencks Act, 18 U.S.C. § 3500 (1958).

Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960); United States v. Aviles, 315 F.2d 186 (2d Cir.), vacated and remanded sub nom. Evola v. United States, 375 U.S. 32 (1963).

The Jencks Act has, of course, been a familiar fixture in the District of Columbia to judges and criminal law practitioners since its enactment in 1957 (P.L. 85-269, 71 Stat. 595). ^{*/} Subsection (a) of the Act provides that the defendant in a criminal proceeding has no right to compel production of any statement or report in the possession of the government which has been made by a prospective government witness until the witness has testified on direct examination. It is thus clear that the subpoenaed documents were not producible under the Jencks Act until the government had completed direct examination of its witness Moore. Appellant's pre-trial subpoena was, therefore, premature.

For this reasons, if the trial court had simply quashed the subpoena on the grounds that discovery under the Act was premature, and if no further mention of the documents

^{*/} The complete text of the Jencks Act is set out in Appendix A(2), infra at page 1-A.

had been made, then perhaps this could be said to be a fitting case for application of a theory that a premature attempt to discover documents, if not timely renewed, constitutes a waiver of what might otherwise be the accused's right to important defensive material. But compare Ogden v. United States, 303 F.2d 724, 734 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964) (where identity and probable course of testimony of government witness is known, pre-trial discovery may be timely and proper); see Moore v. United States, ___ U.S. App. D.C. ___, 328 F.2d 555 (1964) (demand for production treated as timely even though first raised on a post-trial hearing on the appellant's application to appeal without prepayment of costs).

If there is such a theory, however, this is not a fitting case for its application, for appellant's trial attorney took steps after Moore had testified on direct examination to voice his demand again. In addition, his efforts on cross-examination to elicit information concerning the Hood investigation demonstrated beyond question that the eventual production of the documents was still a very earnestly sought objective. A brief summary of the events already set out, supra at pages 46-48, demonstrates the extent and scope of appellant's renewed demands for production during trial. Appellant's trial counsel attempted to cross-

examine Moore on police investigations of official misconduct but the trial court stopped the inquiry on the grounds of materiality. Tr. 37-38. The trial court also prohibited questions directed to Moore's financial circumstances, again on the grounds of "materiality." Judge McGarraghy, Tr. 39. At this point appellant's trial counsel stated that he intended "to go to the Court of Appeals on the ruling that we cannot bring out this article. . . . And I want to know where it is. Your Honor, I take exception to this." Tr. 39-40. Finally, in a review of rulings made by the judge during the course of the trial, counsel for appellant again stated that "I think a lot of the testimony by Rufus Moore, namely, the contents of that file, should be available to me. You have ruled on that." B. G. Moore, Tr. 93.

To insist in the face of these demands for production that a more formal "motion of the defendant" (18 U.S.C. § 3500(b)) is required in order to give an accused his due under the Jencks Act is to ignore all that has been taught by this Court in Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960). The Court there held that "no ritual of words" is required to make the requisite demand after the witness has testified. 108 U.S.

App. D.C. at 40, 278 F.2d at 874. */ And see, e.g., United States v. Aviles, 315 F.2d 186, 191 (2d Cir. 1963) **/ (to add the procedural requirements there argued for by the Government "would now add the niceties of common law pleading in the formulation of demands for producible documents. Of course, the Act does not require that demands for statements be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.")

*/ The opinion in the Howard case, 108 U.S. App. D.C. at 40 n.6, 278 F.2d at 874 n.6, shows that the disputed document was a report prepared by an Officer Troublefield of the Metropolitan Police Department to whom Howard allegedly had sold heroin on two occasions. The dialogue which this Court held sufficient as a "motion" under 18 U.S.C. § 3500(b) was the following:

"Q [by Defense Attorney]. But you do have the statement and it is here. Is that correct? A. [Officer Troublefield] That is correct.

* * * * *

"[Q] May I see it?

"[Assistant U.S. Attorney]. He is not entitled to look at this police report, Your Honor. I object to it. He knows better.

"The Court. Sustained."

The opinion does not indicate that a motion for production other than the isolated question "May I see it?" was made either before or after the quoted exchange. The facts in the instant case are, as has been shown, much more indicative of the continued and often repeated efforts of trial counsel to obtain production.

**/ Vacated and remanded sub nom. Evola v. United States, 375 U.S. 32 (1963).

Moreover, as this Court in the Howard case pointed out, the trial court's opposition to the entire line of questioning by means of which defense counsel at the trial attempted to delve into the disputed document "emphasized the futility of efforts to further pursue the matter." Howard v. United States, supra. Under such circumstances, maintaining respectful silence in the face of determined judicial opposition cannot be said to bring the case within the rule of Harrison v. United States, 115 U.S. App. D.C. 249, 318 F.2d 220 (1963), cert. denied, 377 U.S. 911 (1964), where the trial counsel affirmatively and specifically abandoned his prior suggestion that he would like to see the statements in question. In the present case, trial counsel's every effort to continue his attack against Moore's testimony invariably encountered the trial judge's opposition and a formal motion for production at any time after the judge's pre-trial ruling would have been an empty ceremony and most certainly would have been denied. */

*/ A candid review of the transcript of the extensive pre-trial procedures (Tr. 4-15), the references later during trial to production of the documents (Tr. 36-40, 93), and the many other irregularities in the handling of the production question (see pages __-__, infra) suggest that neither judge, prosecutor nor defense had the Jencks Act firmly in mind. The judge and prosecutor seem to have operated under a theory of executive privilege

D. The Trial Judge Committed Several Reversible Errors in His Determination of the Merits of Appellant's Demands for Production.

The review thus far of the conduct of the Jencks Act hearing in the trial court shows quite plainly that the trial judge inadvertently committed several reversible errors. These will be considered seriatim.

1) The Summary Nature of the Document Review.

First, the trial judge himself admitted that during the short pre-trial recess he had not read all of the statements in the one-inch thick file "in their entirety." Judge McGarraghy, Tr. 13. Even with respect to the Moore statement, the trial judge could only give the rather vague assurance that "I did review the statement made by Mr. Moore carefully enough to determine that nothing in that statement relates to the case on trial today." Judge McGarraghy, Tr. 13. Finally, the judge's review was so summary that even immediately after

*/ (Footnote continued from preceding page)

for confidential documents, while the defense argued for the unqualified right of full disclosure which would be more familiar to a lawyer used to proceeding under the more sensible and humane rules of discovery on the civil side of the docket. Cf. Tr. 10. Full disclosure is not, of course, required by the Jencks Act. But it is equally true that any asserted executive privilege would not be relevant in determining whether the documents were producible under the Jencks Act. See *Saunders v. United States*, 114 U.S. App. D.C. 345, 348-49, 316 F.2d 346, 349-50 (1963), cert. denied, 377 U.S. 935 (1964); *United States v. O'Connor*, 273 F.2d 358 (2d Cir. 1959).

reviewing the file of statements he still was not quite certain of the name of Hood, the former police narcotics operative who apparently was the central figure in the investigation to which the statement related.*

But the in camera inspection by the trial judge required by Subsection (c) of the Jencks Act (see Appendix A(2) infra at page A-1) means much more than simply a summary scanning of statements demanded by the accused. Palermo v. United States, 360 U.S. 343, 350 (1959). See e.g., the type of close scrutiny enforced by this Court just the other day in Williams v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (decided October 1, 1964). The same careful analysis, it should be noted, was employed both by the majority and by the dissenting judge in Williams.

The inspection by the trial judge required to determine whether a disputed document is a "substantially verbatim" (18 U.S.C. § 3500(e)(2)) recital of a witness' oral statement must be especially acute, e.g., Campbell v. United States, 365 U.S. 85, 92 (1963). But it does not

* / "THE COURT: * * *

"In regard to the other envelope which contained papers relating to Mr. Hood, as I remember the name of the detective -- Hood, wasn't it?

"[The Prosecuting Attorney]: Yes, Your Honor,"
(Tr. 12-13).

follow that the inspection required to determine whether a statement "related to the subject matter" (18 U.S.C. § 3500(b)) of a witness' trial testimony may be summary in comparison. The Supreme Court in the first Campbell case, supra at 95, quite pointedly stated in this regard that:

"The statute . . . implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute -- the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce 'statements' which the statute requires to be produced."

Referring to the above-quoted passage in the first Campbell case, the Court of Appeals for the Ninth Circuit stated in Ogden v. United States, 303 F.2d 724, 733 (1962), cert. denied, 376 U.S. 973 (1964), that:

"An affirmative duty is placed upon the trial court to secure the information which is necessary to a proper ruling on particular requests for production in the light of the statutory purposes."

Surely this "affirmative duty . . . to secure the information which is necessary to a proper ruling" includes the affirmative duty to inspect carefully and fully the documents claimed to be producible. This the court below has not yet done. Its failure constitutes reversible error.

2) Prejudgment of Relevance of Documents. Second, perhaps the most egregious departure from the procedures required in a nisi prius Jencks hearing was the trial court's failure to consider the disputed documents in the context of the witness' testimony. United States v. Spangelet, 258 F.2d 338, 341-42 (2d Cir. 1958). The record leaves little doubt that the trial judge had conclusively determined to exclude all of the documents before any witness in the case had even taken the stand and thus before he could consider the relevance of the documents in the context of specific testimonial statements.

Such a procedure is squarely in conflict with the plain requirement of the Act, 18 U.S.C. § 3500(b), that the trial judge must determine the relevance of statements "after a witness called by the United States has testified" The entire rationale of the Jencks Act is to make available to the defense, under the circumstances and qualifications stated in the Act, certain of the materials in the possession of the government which might lead to the impeachment of government witnesses.* / While

* / See Sen. Rep. No. 981, 85th Cong., 1st Sess. 2, 3 (1957) H. Rep. No. 700, 8th Cong. 1st Sess. 2, 4 (1957); and see, e.g., Campbell v. United States, 365 U.S. 85, 92 (1961).

it is true that convenience and economy of time well might be served in certain instances by the production of statements prior to trial where the identity and probable testimony of a government witness is known, see Ogden v. United States, 303 F.2d 724, 734 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964), such a procedure certainly has never been thought to preclude a Jencks hearing "after a witness called by the United States has testified" 18 U.S.C. § 3500(b). In most cases, the only information available before the trial commences is contained in the pleadings and neither the trial judge nor defense counsel will know beforehand what a government witness will say on direct examination or cross-examination. To require the defense before trial to point out the relevance of documents whose contents can, at best, only be guessed at would be to effectively preclude all discovery under the Act and thus to deny any possibility of impeachment.

3) Erroneous Standard of Relevance. Third, in denying appellant's pre-trial attempt to have the Hood investigation files produced, the trial court disclosed that it was employing an entirely erroneous standard in determining whether the documents were producibly relevant. The court's ruling upon the relevance of Moore's statement was as follows (Tr. 13):

" . . . However, that statement does not have any reference to the case on trial here. It relates to another matter not related to this matter and, therefore, I am of the opinion that they are not relevant to the matter on trial here today." (Emphasis supplied.)

The trial court here states quite unequivocally that the test of relevancy which it has employed is simply whether the subject matter of the disputed statement relates to the subject matter of the case as a whole.

But this is not the proper standard of relevancy under the Jencks Act. The standard stated on the face of the Act, 18 U.S.C. § 3500(b) and (c), is whether the disputed statement "relates to the subject matter as to which the witness has testified." (Emphasis supplied.) Obviously, the subject matter "as to which the witness has testified" will ordinarily encompass much more than the narrow subject matter which is charged in the indictment.

These fundamental errors in determining whether the statements were producible under the Jencks Act would ordinarily require only that the judgments be vacated and the case remanded so that a Jencks hearing could be held. But in the present case the trial court erred further and, as shall be seen, limited the permissible scope of cross-examination by the defense to matters which under the pre-trial ruling were "relevant to the subject matter of this case." Because of this erroneous limitation, much testimony

by Moore to which the disputed statements might have related was never permitted to be elicited. In order to elicit this vital portion of Moore's trial testimony, a new trial obviously is required.

E. The Trial Court's Erroneous Limitations Upon the Defense's Cross-Examination of the Government Witness Moore Requires that a New Trial Be Granted.

The trial court erred in this regard, first, in prohibiting defense counsel from seeking on cross-examination of the witness Moore to elicit information concerning the statement he had made in connection with the Hood investigation and, second, in refusing to permit examination into the witness' personal finances so as to impeach the witness by a showing of interest. The first of these rulings compounded the error of the court in failing to inspect the disputed documents at the proper point in the trial and under the proper standard of relevance. The second erroneous ruling was related to the first and introduced the additional error of refusing to permit cross-examination on a relevant and material matter essential to appellant's defense.

At the time of the pre-trial hearing, there was no reliable indication whether Hood or Moore, or both, had been the subject of the police investigation. On cross-examination, appellant's trial counsel asked Moore whether he had been the subject of a police investigation and Moore

stated unequivocally that he had not. Tr. 37-38. But when defense counsel attempted to ask Moore whether he had been involved in an investigation of any other person (Tr. 37), */ the court cut short this line of questioning on the grounds that " . . . if there were any investigation of anyone else, I don't see how it could possibly be material to this case. . . ." Judge McGarraghy, Tr. 38.

This ruling precluded appellant even from asking whether Moore had in fact made a statement, a predicate which some courts may require to be laid as a basis for seeking production of a Jencks statement. See Ogden v. United States, 303 F.2d 724, 736 (1962), cert. denied, 376 U.S. 973 (1964). At the minimum, therefore, the answer to the defense's question would have been fully relevant and material as the basis for demanding production of the witness' prior statement. The court's refusal even to permit the question to be asked thus denied appellant his statutory right to have the witness' statement inspected.

*/ The order of questions stated here is the reverse of the order in which they actually were asked at the trial, but is the same order in which the trial judge thought at the time they had been asked. See Tr. 37. Because the judge based his ruling on the testimony as he thought it had been given, that order has been followed here in considering the correctness of his ruling.

Soon after the above ruling, the defense asked Moore whether he had a checking or savings account, but the court sua sponte ruled that the question was immaterial. This again was an abuse of the court's discretion to control the trial, because defendant had an absolute right to delve into Moore's financial condition in an attempt to show unaccounted for accumulations of wealth. This information might very well have been developed into a successful impeachment of Moore along the lines which the defense earlier had explained to the court -- that Moore had falsely implicated appellant as a seller of narcotics as a means of covering up for shortages in Police Department Advance Funds.

It is not disputed, of course, that the trial judge possesses certain powers of discretion in the control of a party's cross-examination. "[B]ut it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative." Lindsey v. United States, 77 U.S. App. D.C. 1, 2, 133 F.2d 368, 369 (1942). In the present case that opportunity was never available due to the opposition of the trial court.

The leading case on the absolute right to cross-examine on collateral matters is Alford v. United States, 282 U.S. 687 (1931), and see District of Columbia v. Clawans, 300 U.S. 617, 632 (1937). In the Alford case the Supreme Court reversed a conviction after a trial in which the

defendant was not permitted to cross-examine one of the several prosecution witnesses. Although the information sought by the defense would only have concerned "who the witness is, where he lives and what his business is" (282 U.S. at 689), the Supreme Court held that the defense had the right to identify the witness with his community so that further, independent testimony could be sought by the defense to discredit the witness' veracity. (Ibid)

The trial court's refusal here to permit the witness Moore to be put to the test of thorough cross-examination of his financial circumstances meant that much possible testimony concerning his handling of the Police Department Advance Funds committed to him could not be developed. It is no answer to say that the defense had nothing but conjecture as a basis for believing that this cross-examination might be fruitful, for, as the Supreme Court stated in Alford (282 U.S. at 692):

" Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test,

without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ."

It is thus clear that the trial court's refusal to permit appellant to inquire into the government witness' possible personal and financial interest in the conviction of appellant denied appellant a substantial right that can be vindicated only by a new trial.

F. Appellant Suffered Prejudice As a Result of the Trial Court's Erroneous Rulings and Procedures with Respect to the Jencks Statements.

The Supreme Court decision which established the right, recognized and codified by the Jencks Act, ^{*}/ to the production of statements which might be helpful to a criminal defendant recognized that such statements may have a wide but unanticipated range of uses in assisting the defense:

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only

^{*}/ Sen. Rep. No. 981, 8th Cong., 1st Sess. 3 (1957);
H. Rep. No. 700, 8th Cong., 1st Sess. 3-4 (1957);
Campbell v. United States, 373 U.S. 487, 496 n.22 (1936);
Campbell v. United States, 365 U.S. 85, 92 (1961).

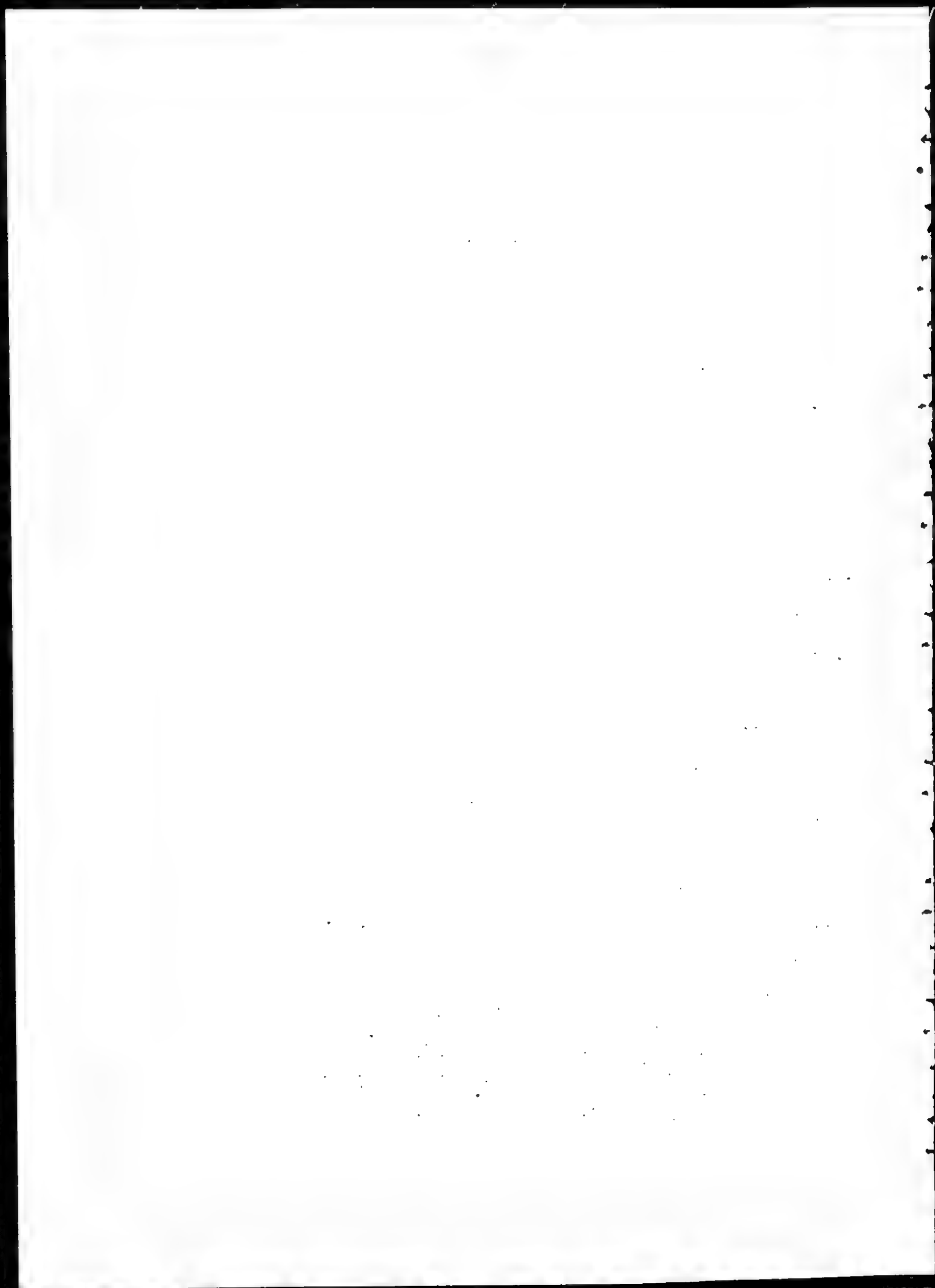
test of inconsistency. The diversion from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." Jencks v. United States, 353 U.S. 657, 667 (1957).

Thus, if in fact the prior statement by Moore and other documents would have been producible under the Jencks Act -- a fact which can be determined only when a proper hearing is held -- it must also be assumed that appellant has suffered prejudice as a result of their non-production. In all but the most unusual case, the utility of producible documents can only be determined at trial. See Rosenberg v. United States, 360 U.S. 367, 371 (1959); Clancy v. United States, 365 U.S. 312, 316 (1961). The test of whether the prejudice suffered requires a reversal, as stated in an analogous situation by the Supreme Court in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), is whether there is a "reasonable possibility" that the error complained of "might have contributed to the conviction" (Emphasis supplied.) In the present state of the record, such a possibility is indeed reasonable.

But because of the trial judge's erroneous restrictions on appellant's right to cross-examine Moore -- and leaving to one side for the moment the other errors, discussed elsewhere, which require a new trial -- the prejudice which appellant has suffered cannot be cured simply by vacating the judgment and remanding the case to the trial court for a Jencks Act hearing. ^{*}/ If only this were done, appellant on remand could show the relevance of the disputed statements only in relation to the direct and cross-examination testimony of the witness Moore which presently appears in the trial transcript. Testimony which would have appeared in the transcript, but for the erroneously restrictive exclusions and rulings by the trial court, could, of course, form no foundation for the relevance of the statements.

It is therefore submitted that the only remedy which can remove the prejudice which appellant has suffered in the trial court would be to send the case back for a new trial.

^{*}/ Remand for further hearing is, of course, the customary remedy in a case where the Jencks hearing has been held at trial but was erroneously conducted. See, e.g., Campbell v. United States, 365 U.S. 85, 98-99 (1961); Williams v. United States, ___ U.S. App. D.C. ___, 328 F.2d 178, 181 (1963); Moore v. United States, ___ U.S. App. D.C. ___, 328 F.2d 555 (1964).



V. CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

s/ Charles W. Wolfram
Charles W. Wolfram

701 Union Trust Building
Washington, D.C. 20005

Attorney for Appellant
(Appointed by This Court)

Dated: October 5, 1964

APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1) U.S. Const., amend. VI:

In all criminal prosecutions,
the accused shall enjoy the right . . .
to have the Assistance of Counsel for
his defence.

2) Jencks Act, 18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of

such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

3) 26 U.S.C. § 4744(a):

(a) Persons in general. -- It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) --

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742, to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

4) 26 U.S.C. § 4742:

(a) General requirement. -- It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such

marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions. -- Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply --

(1) Professional practice. -- To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) Prescriptions. -- To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: Provided, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: Provided further, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) Exportation. -- To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials. -- To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) Certain seeds. -- To a transfer of any seeds of the plant *Cannabis sativa* L. to any person registered under section 4753.

(c) Supply. -- The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the

Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) Preservation. -- Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

(e) Exemption of certain transfers to millers. -- Nothing in this section shall apply to a transfer of the plant *Cannabis sativa* L. or any parts thereof from any person registered under section 4753 to a person who is also registered under section 4753 as a taxpayer required to pay the tax imposed by paragraph (6) of section 4751.

5) 26 U.S.C. § 4705 (a):

(a) General requirement. -- It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued

in blank for that purpose by the Secretary or his delegate.

6) 26 U.S.C. § 4704(a):

(a) General requirement. -- It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

7) 21 U.S.C. § 174:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize

conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1964.

8) D.C. Code § 14-305 (Supp. III, 1964):

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient. (Dec. 23, 1963, 77 Stat. 519, Pub. L. 88-241, § 1.)